87-2131

No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

LEE HERBERT WALDHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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20 pp

II. QUESTIONS PRESENTED

A. May an electronic search warrant issued on a resident telephone facility within the territorial jurisdiction of the issuing judge be lawfully executed by law enforcement authorities by recording electronically intercepted communications outside the territorial jurisdiction of the issuing judge.

B. Is the territorial jurisdiction of the judge authorizing an electronic surveillance and interception of oral and wire communications a "core concern" of Congress in enacting Title III which, if exceeded, triggers the statutory exclusionary provisions of 18 U.S.C. §2518(10).

III. LIST OF PARTIES

All parties to the cause of action are included in the caption.

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VI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LEE HERBERT WALDHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

The Petitioner, LEE HERBERT WALDHART, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on direct appeal, United States of America v. Lee H. Waldhart, 837 F.2d 1519 (11th Cir. 1988).

VII. OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit on direct appeal is cited, United States v. Nelson [et al.], 837 F.2d 1519 (11th Cir. 1988).

VIII. JURISDICTION

The case originated as a criminal prosecution in the United States District Court, Northern District of Florida. Upon conviction, direct appeal of the final order, judgment and sentence, was timely prosecuted to the United States Court of Appeals, Eleventh Circuit, pursuant to 28 U.S.C. §1291. The oral argument panel affirmed with an opinion on 25 February 1988, United States v. Nelson [et al.], 837 F.2d 1519 (11th Cir. 1988). Petition for rehearing and suggestion for en banc consideration were timely filed and later denied on 22 April 1988. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 20.1.

IX. STATUTES INVOLVED

A. Wire Interception and Interception of Oral Communications, 18 U.S.C. §2510, et seq.

18 U.S.C. §2518. Procedure for interception of wire or oral communications:

> (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that--[1] (emphasis added)

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[1] Amended Pub. L. 99-508, §106(a) added "(and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)" following "judge is sitting." The statute now reads:

> (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction),

(Footnote Continued)

B. Security of Communications Act, §934 Fla. Stat.

§934.09 Fla. Stat. (1985). Procedure for interception of wire or oral communications:

> (3) Upon such application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception or wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting if the judge determines on the basis of the facts submitted by the applicant that--

---

(Footnote Continued)

> if the judge determines on the basis of the facts submitted by the applicant that--

X. STATEMENT OF THE CASE

A. Operative Facts

In this case the state court territorial jurisdiction lines coincide with federal court territorial jurisdiction lines. The state circuit judge who issued the wiretap order resided in, and was sitting at the time of issuance, in the Fourth Judicial Circuit, Duval County, Florida. The Fourth Judicial Circuit of Florida is wholly within the federal territorial boundaries of the Middle District of Florida. The electronic search was executed and all telephone conversations were recorded in an abutting county, Alachua County, Florida, which is wholly within the Eighth Judicial Circuit of Florida and the Northern District of Florida. The prosecution was commenced in the Northern District of Florida. The state wiretap statute was identical to the then existing federal wiretap statute. The prosecution was instituted in the United States District Court for the Northern District of Florida.

B. Specific Facts

On 07 March 1984 a deputy sheriff of Alachua County, Florida, cross-sworn as a special investigator of the State Attorney's Office of the Fourth Judicial Circuit, obtained authorization from each of the respective state attorneys of the Fourth and Eighth Judicial Circuits of Florida to install a dialed number recorder on the residence of one Frank Guido, who resided in Clay County, Fourth Judicial Circuit, Middle District of Florida. On the same day, state circuit judge Clifford B. Shepard (R11-179) entered an order authorizing the installation of a dialed number recorder (DNR) located on the facility of the residence of Frank Guido, "Route 1 or Route 3, Box 710, Keystone Heights, Clay County, Florida." (Exhibit 2-1), Fourth Judicial Circuit, Middle District of Florida.

Using the information from the DNR's 19 April 1984 both state attorneys authorized the first application to Judge Shepard for a full-scale wiretap (R13-259) on the Guido residence (Exhibit

37; 45). A cross box, or dialed loop extender (transmitter), was installed in Keystone Heights, Clay County, Fourth Judicial Circuit, Middle District of Florida, just down the road from the Guido residence (R18-61, R19-1197). The piece of equipment allowed agents to bridge into Mr. Guido's home telephone and allowed monitoring agents to transmit the audio anywhere in the world (R18-1061). The agents could "either listen to it there, or could -- in this case, we sent it back to Gainesville to be monitored at the narcotics office." Id. The technical name for the equipment is "high piece electronic bridging amplifier." Narcotics agents refer to it as a "slave." The device transmitted electronic or electrical impulses from the Middle District of Florida to the listening post in the Northern District of Florida (R19-191) where the conversations were recorded.

Thereafter using the same method and same procedures a second wiretap was commenced on 25 May 1984 of the Guido residence as well as two

nearby public pay telephone facilities located at the Gizmo Grocery Store at the intersection of Highway 100 and Highway 214, Lake Geneva, Keystone Heights, Clay County, Fourth Judicial Circuit, Middle District of Florida. The pay telephones were the typical coin-operated telephone facilities located adjacent to one another on the outside of the Gizmo Grocery Store accessible to the general public. (See Exhibit 43 and attachments.) Cross boxes for the pay telephone facilities were also located in Clay County, Fourth Judicial Circuit, Middle District of Florida (R19-1198).

Mr. WALDHART was intercepted on 02 and 03 June 1984 on the Guido residence telephone and is an "aggrieved person" as contemplated by 18 U.S.C. §2510(11). A synopsis of the conversation was used for later intercept extensions of the Gizmo pay telephones (Exhibits 41 and 42).

On 22 June 1984 the same state judge under the same circumstances authorized an extension of the wiretap intercept on the Gizmo telephones as

well as a second extension on the Guido phones. The Gizmo taps ran from 25 May through 01 August 1984 (Exhibit 17). The Guido taps ran from 23 April through 21 July 1984.

C. Summary

In summary (R13-465), the judge who issued the order was in Duval County, Middle District of Florida, at all times (R13-465-466). Nowhere in the applications or other paperwork did it indicate that the monitoring activity was going to be accomplished in Gainesville, the Northern District of Florida (R13-466). From inception, the case was a joint federal/state investigation (R17-816). From inception, it was realized the investigation would be multi-state (R17-871). The respective law enforcement agencies had discussions regarding the complications of this multi-circuit, multi-district situation with law enforcement officers from one jurisdiction tapping a telephone located in another jurisdiction (R15-469). However, there was no discussion regarding approaching a justice of the Supreme

Court of Florida, nor the Governor of the State of Florida, nor the Attorney General of the State of Florida (R15-639).

No applications or affidavits were made before an Article III judge or any United States court (R13-464). No application or authorization was signed by any attorney general or deputy attorney general of the United States nor any Assistant United States Attorney General nor any United States Attorney or Assistant Untied States Attorney (R13-464). The record firmly established that Clay County is in the Middle District of Florida (R13-465), and Gainesville is in the Northern District of Florida (R13-465). Clay County, Florida, is in the Fourth Judicial Circuit, and Alachua County is in the Eighth Judicial Circuit of Florida (R13-465). It is a long-distance telephone call from the Guido residence to Gainesville (R13-465). The local narcotics and organized crime unit was responsible for the primary monitoring and was at all times located in Gainesville, Florida. The only

listening post relative the investigation was in Gainesville, Alachua County, Northern District of Florida (R19-1199). There was no listening post in Clay County, Duval County nor any other county in the Middle District of Florida (R19-1199). Clay County Sheriff's officers were not utilized nor were Jacksonville/Duval County officers (R13-391). The State Attorney's Office of the Fourth Judicial Circuit was not used in monitoring the listening post (R13-391).

XI. REASONS FOR GRANTING THE WRIT

A. Importance of Issues Involved

In the decision below the Eleventh Circuit rendered an unwarranted statutory construction in order to save the results of the case. The finding that the "core concern" of Congress was not triggered by the territorial jurisdiction of the authorizing judge flies in the face of both logic and subsequent amendments to Title III of the Omnibus Crime Control and Safe Streets Act.[2]

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[2] 18 U.S.C. §2518(3) provided:

> Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that-- (emphasis added).

With the 1986 amendments to 18 U.S.C. §2510, et seq., 18 U.S.C. §2518(3) was also amended. Par. (3), Pub. L. 99-508, §106(a), added:

> (and outside that jurisdiction but within the United States in the case of a mobile

(Footnote Continued)

If the analysis were correct that the authority to issue a wiretap order is limited only by subject matter jurisdiction , the 1986 amendments to 18 U.S.C. §2518(3) would not have been necessary. But the amendments were necessary so that

> ...in the case of a mobile interception device, a court can authorize an order within its jurisdiction and outside its jurisdiction. This provision applies to both a listening device installed in a vehicle and to a tap placed on a cellular or other telephone installed in a vehicle.
>
> In most cases, courts will authorize the installation of a device and the device will be located within the court's jurisdiction....

1986 U.S. Code Cong. & Admin. N. 3584.

The intent of Congress could only have been more plain by inserting the actual adjective "territorial." In a mobile telephone interception case:

(Footnote Continued)
interception device authorized by a Federal court within such jurisdiction)" following "judge is sitting."

> A court can authorize an order within its [territorial] jurisdiction and outside its [territorial] jurisdiction.
>
> In most cases, the courts will authorize the installation of a device and the device will be installed within the court's [territorial] jurisdiction.

Id. The 1986 amendments to the Omnibus Crime and Safe Streets Act did not grant federal courts additional "extra-territorial" jurisdiction in the electronic surveillance of residences or other fixed facilities, only in mobile phones.

The fair reading of the legislative history of the 1986 amendments strengthens the conclusion that the authority to judicially order the interception of private telephone conversations from fixed telephone facilities is limited by the geographical confines of the authorizing judicial officer. An electronic search warrant, like a search warrant for physical or tangible evidence

> ...can only be operative in the territory in respect of which the issuing officer is clothed with judicial authority.

United States v. Strother, 578 F.2d 397, 399 (D.C. Cir. 1978) [construing "territorial jurisdiction"

of the Federal Magistrates Act, 28 U.S.C. §636 (1970)].

> Judges have proverbially signed papers or done other acts outside their territorial jurisdiction which have effect -- and can only have effect -- within those respective jurisdictions.

United States v. Strother, supra., 578 F.2d at 400.

B. Conflict Among the Circuits

The Supreme Court of the United States should grant the Petition for Writ of Certiorari to the Eleventh Circuit to reconcile a conflict between existing case precedent between the courts of appeal of the Fifth and Eleventh Circuits and the Second Circuit. In the opinion below the Eleventh Circuit effectively re-defined the term "intercept" as used in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510-2520, contrary to the language of the statute and existing case law.

The Eleventh Circuit defined "intercept," United States v. Nelson [Waldhart], 837 F.2d at 1526-1527, to mean "the aural acquisition of the

contents of any communication" stating that "interception" refers to the acquisition of the communication as well as the "initial acquisition by the [recording] device and the hearing of the communication by the person or persons responsible for the recording," citing United States v. Turk, 526 F.2d 654 (5th Cir.)[3] cert. denied, 429 U.S. 823, 97 S.Ct. 74; 50 L.Ed.2d 84 (1976), (emphasis by the court). The court concluded that the term "intercept" as it relates to "aural acquisition" refers to the place where the communication is initially obtained regardless of where the communication is ultimately heard. The opinion of the court held in effect that the communications were "intercepted" at the slave transmitter. In

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[3]The Eleventh Circuit is bound by decisions of the former Fifth Circuit rendered prior to 01 October 1981, Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), and by decisions of Unit B of the former Fifth Circuit rendered after that date. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982).

fact there was no "acquisition," but merely a relaying of the transmission. Both the record and the facts of the case bear this out. Thereafter the court goes on to cite its previous precedent, Adams v. Lankford, 788 F.2d 1493 (11th Cir. 1986), which states that the territorial jurisdiction of the authorizing judge does not implicate the core concerns of Congress in passing Title III. United States v. Nelson [Waldhart], 837 F.2d at 1527. The holdings of both cases should be qualified for reasons stated in Section A, above.

In United States v. Controni, 527 F.2d 708 (2d Cir. 1975), the Second Circuit addressed the issue of tapped conversations which had been seized outside the territorial boundaries of the United States. Part of the conversation had traveled over wire within the United States. The court held that Title III was not implicated because "it is not the route followed by foreign communications which determines the application of Title III; it is where the interception took place." Id. The "interception" or "obtaining"

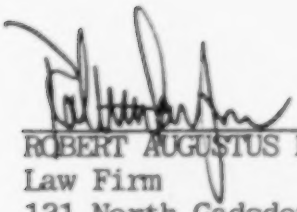
took place in Canada where the conversations were recorded, not over the transmission lines within the United States. Because the conversations were "obtained" outside the territorial boundaries of the United States, Title III was not involved.

In Waldhart the panel has focused on the route of the conversation rather than the point where the communication as actually recorded (or heard). The transmitter or amplifier is not the "device" contemplated in 18 U.S.C. §2510(4), a recorder is. Controni cannot be reconciled against the Waldhart opinion.

XII. CONCLUSION

It is respectfully submitted that not only is the reasoning of the court below unsound, it leads to unworkable results with implications far beyond the specific facts of the case. The likelihood of the appropriate operative procedural facts again coalescing in the foreseeable future is remote. The issue of territorial jurisdiction of the authorizing judge is properly addressed by the Supreme Court. Statutory construction of several key terms of the wiretap statute, "intercept" and "device" being but two, are of national import. The "core concerns" of Congress in drafting the statutory exclusionary language should be visited in future briefs. In sum, the case is procedurally ripe for the Supreme Court to address several key issues of present and future importance to both law enforcement and citizens of the United States.

Respectfully submitted,



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87-2131

No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

LEE HERBERT WALDHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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I. REFERENCES TO THE RECORD NECESSARY TO SHOW PROPER AND TIMELY RAISING OF FEDERAL QUESTIONS

The case is before the Court on the conditional plea of guilty. Mr. WALDHART was allowed to plead guilty, reserving his right to appeal the denial of his motion to suppress the fruits of the electronic surveillance and the denial of his motion to dismiss Count II (R10-696; R27; R31-791).

The case commenced with the indictment of fifteen (15) defendants in a total of thirty-nine (39) counts (R1; RE42-73). Defendant LEE HERBERT WALDHART was named in three (3) counts; the conspiracy (Count II) (R1-1-12; RE59), substantive count of possession of marijuana (Count XXII) (R1-1-20; RE61), and use of a communications facility to facilitate a felony (Count XXXII) (R1-1-27; RE68). The possession count was dismissed by order of the district court (R1-688; RE74) on the Defendant's motion to dismiss alleging due process double-jeopardy grounds (R6-541). Various defendants filed motions to

suppress the fruits of the wire and oral communication interception (R8-541, 551, 555, 574, 575, 576, 576A, 584) which were adopted by Defendant WALDHART (R8-563). In consolidated form, hearings began on 01 May 1986 in Tallahassee. All defense counsel were allowed and availed themselves of the opportunity of presenting supplemental memoranda of law (R9-612, 613, 614, 615, 617, 618, 619, 620). Defendant WALDHART submitted his memorandum on territorial jurisdiction (R9-621). The government responded in a consolidated memorandum in opposition to all motions to suppress (R9-624).

At the time of the scheduled hearing on 19 May 1986 (R9-623), a status conference reported plea agreements to the court indicating that twelve (12) defendants[1] would enter pleas, with "WALDHART to continue with suppression hearing." (R9-626). On the following day, plea agreements

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[1]Two defendants remain fugitives.

were entered (R10-627-656) by all defendants but Mr. WALDHART. On 22 May 1986, Defendant WALDHART argued the suppression issue and the double jeopardy issue which the court took under advisement (R10-671). By written order (R10-688), the court granted the motion to dismiss Count XXII of the Indictment on double jeopardy grounds (R10-688), but denied the motion to suppress. The Defendant thereafter was set for rearraignment (R10-693) and on 30 June 1986 entered conditional pleas under Rule 11(a)(2), Fed. R. Crim. P., to Count II, the conspiracy count, and Count XXXII, use of a wire facility, at which time the minutes of the clerk reflect the Defendant did "reserve right to appeal the court's ruling on motions to dismiss/suppress." (R10-696). [See also R27-723, transcript of rearraignment and plea.] Pursuant to Rule 11(a)(2), Fed. R. Crim. P., notice of reservation of right to appeal was filed with the court below (R31-791). On 13 August 1986, the Defendant was adjudged guilty on Counts II and XXXII and sentenced to a term of two (2) years on

each count to run concurrently and a fifty-dollar ($50.00) special monetary assessment. On 22 August 1986, the Defendant filed his notice of appeal (R31-797). Motion for bail pending appeal (R31-807) was granted (R31-812), and the Defendant is presently not in custody. Rule 22(f)(7)(i), 11th Cir. R. The wiretap issue presented to the Court of Appeals and presented here is applicable only to Petitioner WALDHART.

II. OPINION OF THE LOWER COURT

[837 F.2d 1519]:

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Thomas Manfred NELSON, a/k/a "Nellie", Roger S. Scott, Frank Robert Guido, Jr., Lee H. Waldhart, a/k/a "Mr. Skimo", a/k/a "Tom Burch", William Bruce Arnett, a/k/a "Jeremy", a/k/a "Buzzy", Defendants-Appellants.

No. 86-3476.

United States Court of Appeals,

Eleventh Circuit.

Feb. 25, 1988.

Before VANCE and HATCHETT, Circuit Judges, and O'KELLEY*, District Judge.

HATCHETT, Circuit Judge:

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*Honorable William C. O'Kelley, U.S. District Judge for the Northern District of Georgia, sitting by designation.

In this drug conspiracy case, we apply the teachings of Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), and order that the appellants be afforded relief from the government's breach of their plea agreements through specific performance of the agreements. We affirm in part, reverse in part, and remand.

On December 18, 1985, a federal grand jury in the Northern District of Florida returned a thirty-nine count indictment against fifteen co-defendants, charging them with violations of federal narcotics and tax laws. Five of these persons, appellants, Thomas Nelson, Lee Waldhart, William Arnett, Frank Guido, and Roger Scott, entered into written plea agreements with the government whereby they agreed to plead guilty to certain charges in exchange for the government's promise not to deviate from a statement of stipulated facts which set forth the extent of each appellant's unlawful conduct. Pursuant to the agreements, the appellants pleaded guilty and were sentenced.

In this appeal, the appellants, Guido, Waldhart, Scott, Nelson, and Arnett challenge their sentences on various grounds. Specifically, Guido, Scott, and Nelson content that the government breached the plea agreements and that the district court erred by refusing to grant their motions to either (1) require specific performance of the plea agreements, or (2) permit them to withdraw their guilty pleas. Arnett contends that the district court erred by failing to state objective facts on the record to substantiate the sentence imposed. Waldhart contends that the district court erred by refusing to suppress certain wiretap evidence.

I. The Plea Agreements

Upon the conclusion of pretrial proceedings, the government entered into separate plea agreements with Guido, Scott, and Nelson, which stipulated to the extent of each appellant's illegal conduct as it related to the charges in the indictment. The district court accepted the appellants' guilty pleas and ordered presentence

investigation (PSI) reports. Included in the PSI reports is a Statement of Facts which discusses the illegal conduct of each of the appellants in the drug conspiracy from 1973 until the time of the indictment. Based upon the facts stated in the Statement of Facts, appellants filed motions to have the plea agreements specifically performed or to have the pleas withdrawn. The motions were based on the ground that the Statement of Facts in the PSI reports (1) presented information irrelevant to the appellants' individual involvement and culpability, or (2) presented allegations that expanded the appellants' role in the conspiracy in violation of the stipulated facts in the plea agreements.

DISCUSSION

Our discussion of the plea agreements in this case commences with the seminal decision of Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The principle to be derived from Santobello is "that when a plea rests in any significant degree on a promise or

agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello, 404 U.S. at 262, 92 S.Ct. at 499; see also United States v. Grandinetti, 564 F.2d 723, 725-26 (5th Cir. 1977). In determining whether the terms of a plea agreement have been violated, this court must determine whether the government's conduct is inconsistent with what was reasonably understood by the defendant when entering the plea of guilty. In Re Arnett, 804 F.2d 1200, 1203 (11th Cir. 1986); Johnson v. Beto, 466 F.2d 478, 480 (5th Cir. 1972). If disputed, we determine the terms of the plea agreement according to objective standards. Arnett, 804 F.2d at 1202; see also United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984).

A. Nelson's Plea Agreement

In subsection 4(b) of Nelson's plea agreement, pursuant to which he pleaded guilty to conspiracy to possess with intent to distribute controlled substances in violation of 21 U.S.C.

§§841(a)(1) and 846, Nelson and the government stipulated to the following facts:

1. That the commencement date of this conspiracy as regards the Defendant Nelson is July 1978.

2. That the conclusion of this conspiracy as regards the Defendant Nelson is August 1984.

3. That the Defendant Nelson possessed with the intent to distribute a quantity of marijuana more than 1,000 lbs. but less than 10,000 lbs. That this is a cumulative figure which encompasses the entire extent of the conspiracy as relates to Defendant Nelson contained in the the indictment.

4. That the Defendant Nelson did not possess or distribute any cocaine during the course of this conspiracy as charged in the indictment.

The Statement of Facts in the PSI report states that "Nelson obtained blank birth certificates and furnished same to various

individuals in the Guido organization for use in obtaining drivers licenses and vehicles in fictitious names." This statement is in direct contravention of the stipulated facts in Nelson's plea agreement. The district court stated that it would "strike from the PSI and not consider ... in its determination of [the] appropriate sentence, matters in reference to the blank birth certificates." This is not sufficient for two reasons. The first reason is because the Supreme Court in Santobello, 404 U.S. at 262-63, 92 S.Ct. at 498-99 vacated the conviction and remanded the case to the trial curt, notwithstanding the sentencing judge's statement that the prosecutor's recommendation of a sentence, in violation of the terms of defendant's plea agreement, did not influence him in sentencing. The second reason is that this action by the district court does not bind probation and parole authorities. Hence, we hold that the district curt erred by refusing to grant Nelson's motion to either withdraw his plea or have the plea agreement specifically performed.

B. Scott's Plea Agreement

The relevant portions of Scott's plea agreement with the government provides as follows:

STIPULATED FACTS

The parties agree and stipulate for the purposes of this plea, the presentence investigation, sentencing, and parole consideration to the following facts:

a. That the commencement date of this conspiracy as it regards ... the Defendant, ROGER S. SCOTT began in or about 1979.

b. That the conclusion of this conspiracy as it regards the Defendant, ROBERT S. SCOTT is August of 1984.

c. That the conspiracy alleged in the Indictment relating to the Defendant, ROGER S. SCOTT's complete involvement encompasses a cumulative amount of marijuana over 1,000 lbs. and under 20,000 pounds and the possession of no cocaine with intent to distribute within the purposes of this conspiracy.

d. The parties agree that no other facts as they apply to quantity or identity of contraband substances are applicable; nor will they be submitted by the United States Attorney or any law enforcement agencies who participated in this investigation for the purposes of this plea, the presentence investigation, sentencing and parole consideration.

e. The parties agree that any information submitted by the Defendant or his attorney or the Government and its agents in this case which alters the Defendant's culpability or role in the conspiracy beyond the facts stipulated in Paragraph (4.) STIPULATED FACTS violates this agreement.

Scott contends that the government violated the plea agreement by providing the Parole Commission, as well as the sentencing judge, with a Statement of Facts, which included allegations beyond those contained in the plea agreement. The government contends that the Statement of Facts is well

within the bounds of the stipulated facts and, in the alternative, that even if some allegations are unrelated to Scott, they are nonetheless relevant because the government's theory of the case is that Scott was involved in a widespread conspiracy to distribute controlled substances.

The government's argument is not convincing. Throughout the Statement of Facts are numerous allegations from which one could infer that Scott's involvement in the drug conspiracy was much more extensive than that stipulated to in the plea agreement.

For instance, notwithstanding the unequivocal language in the plea agreement that Scott's involvement in the conspiracy did not involve the possession of cocaine or the intent to distribute the same, the Statement of Facts states:

> During the 1978-80 time frame, Guido and James Forsman bought and sold marijuana and cocaine from Jeffry Quattry, Steve Crumpton, Roger Scott and others. Most of the drugs were delivered by Bruce Gustafson although

some were delivered to New Jersey, North Carolina and Arizona. [Emphasis added.]

....

During 1980 and 81, Mathew Hester delivered both marijuana and cocaine to New Jersey and Wisconsin (Bruce Gustafson) for Arnett and Guido, some of which was obtained from Roger Scott. Emphasis added.]

....

In September 1981, up until sometime in 1983, Ralph Crumpton and Steve Angelini were delivering cocaine to Colorado for Jim Forsman and Frank Guido. Crumpton also began delivering car loads of marijuana to Bruce Gustafson in Wisconsin. Ralph Crumpton made approximately fifteen to twenty trips with the last one containing approximately 80 lbs.

of money (probably in excess of $1 million). [Emphasis added.][2]

The references to cocaine involvement violate the letter and spirit of the plea agreement. In addition, the government's multiple references to marijuana involvement throughout the Statement of Facts implies that the total amount of marijuana with which Scott was involved exceeded the 20,000 pound limit stipulated to in the plea agreement.[3]

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[2]Although this paragraph does not mention Scott, the effect of this paragraph, when viewed in conjunction with the other allegations of Scott's cocaine involvement, is to imply that Scott may have also been involved in these transactions.

[3]The major reason for the appellants' decisions to enter guilty pleas was the offense severity rating which would be determined by the United States Parole Commission. For instance, based on the facts stipulated to in Scott's plea agreement, a federal probation officer estimated that the offense severity rating commensurate with those facts would be a Category 5. The same probation officer, however, wrote to the court in Scott's PSI that "the Parole Commission will in all probability consider [Scott's] overall involvement as opposed to the plea agreement specifying under 20,000 pounds." Thus, the

(Footnote Continued)

C. Guido's Plea Agreement

The operative language of Guido's plea agreement provides as follows:

> The parties agree and stipulate, for the purposes of this plea, the presentence investigation, and the Parole Board to the following facts:
>
> (1) The Defendant GUIDO conspired with other individuals, both named and unnamed, to possess with intent to distribute controlled substances....
>
> (2) The amount of marijuana involved, as aforesaid, was 20,000 pounds. This is a cumulative figure which encompasses the entire extent of the conspiracy as it relates to the Defendant GUIDO in this INDICTMENT.

(Footnote Continued)
cumulative effect of the multiple references to marijuana involvement throughout the government's Statement of Facts resulted in an offense severity rating at Category 6, rather than the Category 5 severity rating which the plea agreement suggested would have been appropriate.

(3) The amount of cocaine involved, as aforesaid, was 9 kilos of cocaine at 45% purity. This is a cumulative figure which encompasses the entire extent of the conspiracy as it relates to the Defendant GUIDO in this INDICTMENT.

....

(1) That in September of 1981, in Levy County, Florida, the Defendant manufactured and possessed with intent to distribute, a quantity of marijuana [20,000 pounds] by growing same on property located there in Levy County, Florida.

e. The parties agree that any information submitted by the Defendant or his attorney or the Government and its agent in this case, which alters the Defendant's culpability or role beyond the facts stipulated herein, violates this agreement.

As with the plea agreements previously discussed, we hold that the government's Statement of Facts

misrepresented Guido's culpability in the conspiracy beyond the facts stipulated to in his plea agreement.

For instance, although the plea agreement specifies that the total amount of marijuana involved in the conspiracy, as it relates to Guido, was 20,000 pounds, the Statement of Facts is replete with references to marijuana from which one could reasonably infer that Guido's involvement in the conspiracy was much more extensive than the stipulated amount of 20,000 pounds. The Statement of Facts alleges, among other things, that:

> A 275 pound marijuana deal in Atlanta was also revealed by the wire which involved Frank Guido....
>
> ....
>
> On June 26, 1985, search warrants were executed on the Clay County property ... and a stash house in Riviera Beach (This is the house [in which] Guido's paramour resided.).... The search of the house

revealed approximately $404,000 and 850 lbs. of marijuana....

....

From at least 1981 through 1984, Guido was having both cocaine and marijuana shipped by vehicle from Florida to Wisconsin on a regular basis and approximately 20 to 30 such trips were documented. The shipments were usually four to five hundred pounds of marijuana and from ounces to kilo quantities of cocaine.

....

During 1982, Angelini was involved with GUIDO and others in a marijuana deal in North Carolina where approximately 1,000 pounds of marijuana was taken to both Wisconsin to Florida.

....

[Phillip Gordon Buscher] ... was involved in obtaining several loads of marijuana from Frank Guido in 1984 including the Lee Herbert

Waldhart deal which involved 463 pounds of marijuana and $190,000.

Jeff Quattry was involved in the marijuana growing operation with FRANK GUIDO that was aborted in Polk County, Florida, in 1982.... During 1982, he was involved in picking up 1500 pounds of marijuana in Davie, Florida, which marijuana was transported to the Gainesville, Florida, area for FRANK GUIDO.

In addition to the allegations recited above, the Statement of Facts also alleged that Guido was involved in a substantial number of other marijuana transactions in Levy County, Florida, involving at least 1,200 marijuana plants. Furthermore, while the plea agreement stipulated that Guido grew marijuana on property located in Levy County, the Statement of Facts alleges that Guido grew or intended to grow marijuana on property located in Levy County, Clay County, Alachua County, and Polk County. Finally, we note a third violation of the plea agreement in that the Statement of Facts alleges that Guido made

both direct and indirect threats against government witnesses during the course of the investigation which gave rise to the indictment. This allegation is in clear contravention of the plea agreement because the stipulated facts do not mention threats made by Guido against government witnesses.

Having decided that the government has breached the terms of the plea agreements, the question remains whether appellants are entitled to have their original plea agreements specifically performed, or should be permitted to withdraw their guilty pleas. "Where the government has not honored a plea agreement, the fashioning of an appropriate remedy is left to the sound discretion of the court." In Re Arnett, 804 F.2d 1200, 1204 (11th Cir. 1986) (citing Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)). In Santobello, the Court outlined two remedies which are available to a defendant whose plea agreement has been violated: (1) "specific performance of the

agreement on the plea, in which case [the defendant] should be resentenced by a different judge," or (2) affording the defendant "the opportunity to withdraw his plea of guilty." Santobello, 404 U.S. at 263, 92 S.Ct. at 499.[4] Although Guido urges that he be allowed to

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[4]Justice Marshall, in a partial dissenting opinion in Santobello, concluded that a majority of the Court shared the view that the defendant's choice concerning the appropriate remedy for violation of a plea agreement should be binding on the Court. Santobello, 404 U.S. at 268 n., 92 S.Ct. at 502 n. (Marshall, J., concurring in part and dissenting in part). See also Santobello, 404 U.S. at 267, 92 S.Ct. at 501 (Douglas, J., concurring) ("In choosing a remedy [for violation of a plea agreement], a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State."). We are, of course, mindful of the inherent dangers in attempting to discern the holding of a majority opinion by extrapolating favorable language from a concurring or dissenting opinion. Significantly, the majority in Santobello did not hold that a defendant's choice of remedy for violation of a plea agreement is binding on the court. Hence, we exercise our discretion, as Santobello teaches, to order that appellants' plea agreements be specifically performed before a new sentencing judge on remand.

withdraw his guilty plea, we deem specific performance to be the appropriate remedy in all three cases. Accordingly, we hold that appellants are entitled to specific performance of their respective plea agreements before a different sentencing judge. See United States v. Shanahan, 574 F.2d 1228 (5th Cir. 1978) (remanding for resentencing by another district judge); United States v. Grandinetti, 564 F.2d 723, 727 (5th Cir. 1977) (same).

II. Judicial Vindictiveness

Prior to sentencing but after the district court accepted his plea, the government served on Arnett an in rem forfeiture complaint seeking forfeiture of his house and farm located in North Carolina. Arnett argued that the attempt to gain forfeiture of the North Carolina property constituted a violation of the terms of his plea agreement which provided in relevant part:

FORFEITURES

The defendant Arnett agrees to the forfeiture to the United States of the Three

Thousand dollars on his person at the time of his arrest.

This is the entire agreement between defendant William Bruce Arnett, and the prosecution, and it has been entered into freely, voluntarily and upon advice of counsel.

Accordingly, during a hering before the district court, Arnett sought specific performance of the plea agreement, or alternatively, to vacate the guilty plea. The district court denied his request. Arnett filed a petition for writ of mandamus or prohibition in this court. In granting mandamus relief, this court held:

> Arnett has suffered no prejudice to date from the filing of the complaint for forfeiture of his farm. It is appropriate, therefore, to allow the United States Attorney to cure the breach of the plea bargain by withdrawing the forfeiture action against Arnett's house and farm. Should the government elect to pursue its action for forfeiture, the district court

is directed to grant Arnett's motion to vacate his plea.

In Re Arnett, 804 F.2d 1200, 1204 (11th Cir. 1986).

Pursuant to the granting of the petition for mandamus, the district court entered an order dismissing the government's in rem forfeiture complaint. At the time of sentencing, however, the court imposed a $100,000 fine which is approximately equal to the value of the North Carolina property.

Arnett, relying upon North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) and its progeny, now argues that a presumption of vindictiveness should attach to the district court's imposition of the $100,000 fine because the fine was simply another way for the district court to accomplish what it had previously been prohibited from doing. Pearce teaches that in order to avoid retaliatory motivation on the part of a sentencing judge, "whenever a judge imposes a more severe sentence

upon a defendant after a new trial, the reasons for his doing so must affirmatively appear [in the record]." Pearce, 395 U.S. at 726, 89 S.Ct. at 2081. Arnett, conceding that he is unable to demonstrate actual vindictiveness, contends that a presumption of vindictiveness is appropriate because the district court did not state articulable, objective, and reviewable facts on the record to support the sentence imposed.

The government responds that Pearce and the other cases relied upon by Arnett are inapposite because Arnett was never resentenced; therefore, no sentence enhancement occurred. In Pearce, the government argues, the defendants had been sentenced, granted a new trial, reconvicted, and then resentenced to longer terms of incarceration without any articulable justification. In this case, the government argues, the district court withheld sentencing, at Arnett's request, so that Arnett could pursue an interlocutory appeal to challenge the government's attempted forfeiture of the North Carolina property. The district court

acquiesced in Arnett's request. We agree with the government that Arnett may not now claim that the district court was vindictive simply because he is dissatisfied with the sentence imposed.[5]

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[5]During the sentencing hearings, the imposition of fines was based, in large part, upon the defendant's role in the drug conspiracy, the likelihood of his prior income coming mainly from profits derived as a result of the various drug transactions, and the district court's realistic assessment of the defendant's personal ability to pay. For instance, with reference to appellant Scott, the district judge stated:

> I have debated a fine. I cannot find in the PSI where he's got any assets that are not encumbered or I would have imposed a fine, because I believe he has obtained substantial monies over the years from this endeavor. I decline to impose a fine because I don't think it would be anything but, you know, a futile gesture.

The only ground relied upon by Arnett in pressing his claim of vindictiveness is that the amount of the fine imposed, $100,000, was equal to the approximate value of the North Carolina property. We refuse to second-guess the motivations of the sentencing judge on the basis of such a dubious ground.

III. Wiretap Evidence

During the investigation in this case, state and federal authorities obtained a wiretap order from the Chief Judge of the Fourth Judicial Circuit of Florida which permitted them to install wiretap devices on telephone facilities located in Clay County, Florida. Florida's Fourth Judicial Circuit is composed of Clay, Duval, and Nassau Counties. Waldhart argues that although the wiretap order issued by the circuit judge permitted authorities to install wiretap devices on telephone facilities located in Clay County, the order did not reflect that any wiretapping devices would be located outside the territorial jurisdiction of the Fourth Judicial Circuit. Nonetheless, Waldhart argues, law enforcement authorities proceeded to install wiretap devices on telephone lines in Clay County which permitted them to transmit the signals back to their offices in Alachua County. Alachua County is not located in the Fourth Judicial Circuit; it is located in the Eighth Judicial Circuit. Thus, Waldhart

contends that all aural acquisitions and recordings of telephone conversations which are at issue in this case were actually intercepted in Alachua County, Florida, territory over which the circuit judge who issued the wiretap order lacked "territorial jurisdiction."

The government argues that both state and federal laws define the term "intercept" to mean "the aural acquisition of the content of any ... communication...." 18 U.S.C. §2510(4); Fla. Stat. §934.02(3). The government relies upon a decision of the former Fifth Circuit where the court, in stating the meaning of the term "intercept" as used in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§2510-2520, stated that "interception" refers to the acquisition of a communication as well as the "initial acquisition by the [recording] device and the hearing of the communication by the person or persons responsible

for the recording."[6] United States v. Turk, 526 F.2d 654 (5th Cir.), cert. denied, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976) (emphasis added). Significantly, the government argues, the court in Turk recognized that communications which are recorded but are not actually heard are still regarded as "aurally acquired."

We agree with the government's argument that the term "intercept" as it relates to "aural acquisitions" refers to the place where a communication is initially obtained regardless of where the communication is ultimately heard. In addition, Waldhart's claim is foreclosed by our recent decision in Adams v. Lankford, 788 F.2d 1493 (11th Cir. 1986). In Adams, a state prisoner alleged a violation of Title III because "the

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[6] Title III of the 1968 Omnibus Crime Control and Safe Streets Act forbids the interception or disclosure of wire or oral communications and provides a procedure for law enforcement officials to intercept communications after receiving authority to do so.

district attorney who applied for [a wiretap] order and the judge that authorized the wiretap were not in the same county as some of the tapped telephones." We denied relief, holding that territorial jurisdictional limitations did not implicate Congress's core concerns in passing Title III. Adams, 788 F.2d at 1498-99. Accordingly, the district court properly denied Waldhart's motion to suppress the wiretap evidence.

We have considered other issues presented by appellants and find them to be without merit.

CONCLUSION

In summation, we hold (1) that the government breached the respective plea agreements by submitting a Statement of Facts in the presentence investigation reports which represented the culpability of the appellants beyond the facts stipulated to in the plea agreements (new sentencing hearings); (2) that Arnett's judicial vindictiveness claim fails (judgment affirmed); and (3) that territorial limitations do not

implicate a core concern of the federal wiretap statutes (Waldhart judgment affirmed).

Accordingly, the convictions, sentences, and judgments as to Arnett and Waldhart are affirmed.

As to Guido, Scott, and Nelson, their convictions are affirmed; their sentences are vacated, and the district court is directed to order specific performance of their plea agreements; thereafter, they should be sentenced by a judge other than the original sentencing judge.

AFFIRMED in part, REVERSED and VACATED IN PART, and REMANDED with directions.

III. JUDGMENTS SOUGHT TO BE REVIEWED:

A.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-3476

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus,

THOMAS MANFRED NELSON,

a/k/a "Nellie",

ROGER S. SCOTT,

FRANK ROBERT GUIDO, JR.,

LEE H. WALDHART, a/k/a

"Mr. Skimo" et al

WILLIAM BRUCE ARNETT, et al,

Defendants-Appellants.

Appeal from the United States District Court for the NORTHERN DISTRICT OF FLORIDA

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion February 25, 1988, 11 Cir., 198___, ___F.2d___). (April 22, 1988)

Before VANCE and HATCHETT, Circuit Judges, and O'KELLEY*, District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/S/ Joseph W. Hatchett
United States Circuit Judge

*Honorable William C. O'Kelley, U.S. District Judge for the Northern District of Georgia, sitting by designation.

B.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3476

D.C. Docket No. 85-34

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS MANFRED NELSON,

a/k/a "Nellie",

ROGER S. SCOTT,

FRANK ROBERT GUIDO, JR.,

LEE H. WALDHART, a/k/a "Mr.

Skimo", a/k/a "Tom Burch",

WILLIAM BRUCE ARNETT, a/k/a

"Jeremy", a/k/a "Buzzy",

Defendants-Appellants.

Appeals from the United States District Court for

the Northern District of Florida

Before VANCE and HATCHETT, Circuit Judges, and O'KELLEY*, District Judge.

J U D G M E N T

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the convictions, sentences and judgments as to defendants Arnett and Waldhart are hereby, AFFIRMED; and that the convictions as to defendants Guido, Scott and Nelson are hereby, AFFIRMED; and their sentences in these causes be and the same are hereby, VACATED and REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

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*Honorable William C. O'Kelley, U.S. District Judge for the Northern District of Georgia, sitting by designation.

Entered: February 25, 1988

For the Court: Miguel J. Cortez, Clerk

By: /S/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: MAY 02 1988

C.

UNITED STATES DISTRICT COURT FOR

NORTHERN DISTRICT OF FLORIDA

United States of America vs.

DEFENDANT -- LEE H. WALDHART

Docket No. GCR 85-00034

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date --

August 13, 1986.

COUNSEL --

[X] WITH COUNSEL -- Robert Harper

PLEA --

GUILTY, and the court being satisfied that there is a factual basis for the plea.

FINDING & JUDGMENT --

There being a finding of -- [X] GUILTY. Defendant has been convicted as charged of the offense(s) of violating Title 21, United States Code, Sections 843(b) and 846, as charged in Counts 2 and 32 of the Indictment.

SENTENCE OR PROBATION ORDER --

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count 2.

On Count 32, the defendant is hereby committed for a period of two (2) years, to run concurrently with the sentence imposed in Count 2.

As required by Title 18, United States Code, Section 3013, a $50.00 special monetary assessment is imposed.

The defendant may, at his own expense, report to the designated institution, or if designation is not made prior to September 12, 1986, the defendant shall report to the United States Marshall in Madison, Wisconsin, at 12:00 noon on September 12, 1986.

By /S/ Sharon Jacobs
Deputy Clerk

Signed by --
[X] U.S. District Judge /S/ Maurice M. Paul
MAURICE M. PAUL

Date August 13, 1986